SUPREME COURT, U. S.

Supreme Court, U. S.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1352

ROBERT E. WALDEN and ROSEMARY WALDEN,
Petitioners,

vs.

SMALL BUSINESS ADMINISTRATION, DOES 1-100,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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I

OPINION OF COURT OF APPEALS FOR THE NINTH CIRCUIT

The Court of Appeals for the Ninth Circuit rendered its Memorandum Opinion on December 19, 1973 in the above-entitled case with the direction that it not be published.

A copy of this Memorandum is included in this Petition in the Appendix.

II

STATEMENT OF JURISDICTIONAL GROUNDS

A. The Memorandum Opinion of the Court of Appeals in this case was filed December 19, 1973, and judgment was entered on that day.

B. No Petition for Rehearing was filed in the Court of Appeals, and no request has been made for an order extending the time within which to petition for certiorari.

C. Jurisdiction is conferred upon this Court to review the judgment in this case of the Court of Appeals for the Ninth Circuit by writ of certiorari under the provisions of United States Supreme Court Rules, 28 U.S.C. Rule 19(b) in that the issue raised by this Petition is whether the doctrine of sovereign immunity, and in particular the fraud exception to the Federal Tort Claims Act is unconstitutional. Under Rule 19(b) we respectfully submit that this issue is an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States.

D. The question presented for review is whether persons harmed by fraud of the Small Business Administration may recover damages for such fraud by an action against the government of the United States of America or whether the government of the United States of America is immune from liability for fraud by virtue of the doctrine of sovereign immunity or the exceptions in the Federal Tort Claims Act, 28 U.S.C. 2680(h). Petitioners respectfully contend that the doctrine of sovereign immunity, and in particular

the fraud exception to the Federal Tort Claims Act, is unconstitutional as in contravention of the Fifth, Ninth and Tenth Amendments of the Constitution of the United States of America.

E. The statutes and constitutional provisions involved in this case are:

1. *Federal Tort Claims Act*

(a) 28 U.S.C., Section 1346(b) provides: Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
(b) 28 U.S.C. Section 2680(h): The provision of this chapter and section 1346(b) of this title shall not apply to . . . . (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

2. *United States Constitution—Fifth Amendment*

"No person shall . . . be deprived of . . . property without due process of law. . . ."

3. *United States Constitution—Ninth Amendment*

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

4. *United States Constitution—Tenth Amendment*

"The powers not delegated to the United States by the Constitution . . . are reserved . . . to the people."

F. Statement of the case.

The complaint alleges that the Small Business Administration advised Petitioners as to the purchase of certain real property, and loaned Petitioners money to make the purchase after the Small Business Administration had appraised the property.

The complaint alleges, that with intent to deceive Petitioners and induce them to borrow money to purchase the property, the Small Business Administration represented to Petitioners that the property was worth $100,000.00.

The complaint alleges that, in reliance on the representation of the Small Business Administration that the property was worth $100,000.00, Petitioners entered into a loan contract with the Small Business Administration, borrowed $100,000.00 from the Small Business Administration, and purchased the property with the borrowed money.

The complaint further alleges that the representation that the value of the property was $100,000.00 was untrue, that the appraisal by the Small Busi-

ness Administration had appraised the property at $49,000.00, that the Petitioners were unaware of the $49,000.00 appraisal and had relied on the Small Business Administration representation of the $100,000.00 value in entering into the loan agreement with the Small Business Administration. (Record on Appeal, pages 5-6)

We submit that the complaint alleges a plain case of fraud on the part of the Small Business Administration against the Petitioners.

The District Court dismissed the action on the ground that while the Federal Tort Claims Act, 28 U.S.C. Section 1346(b), 2671 et seq., has permitted certain suits against the federal government for tort, 28 U.S.C. Section 2680(h) specifically exempts misrepresentation and deceit from tort claims which may be brought against the government of the United States of America. (Record on Appeal, pages 113-114)

The District Court further declined to hold that 28 U.S.C. Section 2680(h) is unconstitutional as a denial of due process of law under the Fifth Amendment or in violation of the Ninth and Tenth Amendments of the Federal Constitution. (Record on Appeal, pages 114-115)

The Court of Appeal for the Ninth Circuit affirmed the ruling of the District Court saying:

> "In the absence of guidance by the Supreme Court supporting Walden's position, our duty is to apply the current principles of sovereign immunity."

As we discuss more fully under the heading of "Argument", infra, the question here raised as to the constitutionality of the doctrine of sovereign immunity and in particular the exception to the Federal Tort Claims Act for fraud by the government has never been mentioned by the Supreme Court of the United States in any case in the history of this nation.

This is truly a case of first impression.

G. Basis for federal jurisdiction in court of first instance.

While the complaint in this litigation was originally filed in Superior Court of the State of California in and for the County of Butte, the action was removed from the state court to the United States District Court for the Eastern District of California on a petition for removal filed by the United States Attorney.

The United States District Court had federal jurisdiction by virtue of 28 U.S.C. Section 1346(b).

III

ARGUMENT

A. INTRODUCTORY COMMENTS

We urged in the Trial Court and we again urge here that the concept of sovereign immunity should be rejected, and the immunity provisions of the Federal Tort Claims Act should be declared unconstitutional as in violation of the Fifth, Ninth and Tenth Amendments of the Constitution of the United States of America.

A citizen of the United States of America sues the government of the United States for falsely representing that property was worth $100,000.00 when it had an appraisal in its possession showing its value at $49,000.00.

What does the government of the United States of America say?

It says—Even if it did happen, you are not entitled to *even a hearing* in a Court of Justice of the United States!

Even if it did happen you cannot sue the United States of America.

Even if it did happen and even if you might be permitted to sue the United States of America, your government cannot be held liable, even though any private person, doing what it did, would be held liable for the same conduct.

As there is no declaration by any official of the United States which, under oath, denies the allegations under oath of the Plaintiffs, these proceedings in legal effect, say, yes, your government defrauded you, but you can't do anything about it!

Does that *sound* like the government of the United States of America? Does that *sound* like a government in a nation of free men?

B. THE CONCEPT OF SOVEREIGN IMMUNITY IS IN VIOLATION OF THE NINTH AND TENTH AMENDMENTS

The United States Constitution does not specifically or inferentially recognize a concept or a doctrine of governmental immunity. No word or phrase in the Constitution can be pointed to which could form the basis of a power of self-immunization from responsibility for its own conduct. The Ninth Amendment to the Constitution clearly states that there are rights, not enumerated, which are retained by the people. The Tenth Amendment states clearly that powers not delegated to the United States *by the Constitution* are reserved to the people. The Constitution does not reserve any concept of governmental immunity. The Eleventh Amendment was enacted as a direct result of the decision of the United States Supreme Court in *Chisholm v. Georgia* (1793) 2 U.S. 16 in which the Court ruled that an individual could sue a state government in the Federal Court, utterly rejecting the concept of sovereign immunity, utterly rejecting the concept that as between man and his government that the government is sovereign and saying on page 47:

> "The sovereign, when traced to its source, must be found in the man."

Chisholm v. Georgia has never been overruled.

The rationale of sovereign immunity as an aspect of the "Divine Right of Kings" is wholly unsupportable in a democracy and is totally rejected by the Tenth Amendment language which says "The powers not delegated to the United States by the Constitution . . . are reserved . . . to the people."

The rationale of sovereign immunity as "paramount even over rights founded on the Constitution" *(Pflueger v. United States,* 121 F.2d 732, 735) is wholly irreconcilable with the plain words of the Tenth Amendment.

It is very doubtful whether the doctrine of sovereign immunity ever existed in England. *Muskopf v. Corning Hospital District* (1961) 55 Cal.2d 211, 359 P.2d 457.

And the concept is basically "un-American."

C. THE IMMUNITY PROVISIONS OF THE FEDERAL TORT CLAIMS ACT ARE IN VIOLATION OF THE FIFTH, NINTH AND TENTH AMENDMENTS

The Federal Tort Claims Act purports to permit suits against the Federal Government for torts committed by the government but specifically attempts to exempt liability for the heinous tort of fraud.

Is the rationale the *worse* the tort the *less* the liability?

Is this liability for *little* torts, but not for *big* ones?

Is there any rational basis for saying the government of the United States is liable to its citizens for *carelessly* harming them, but is not liable for *intentionally* harming them?

The Fifth Amendment to the Constitution says:

> "No person shall be . . . deprived of life, liberty, or property without due process of law."

The concept of due process includes many thoughts basic to the governing process in a nation of free men including, but not limited to, the notion that there must be a rational basis for a legislative enactment (*James v. Strange* (1972) 32 L.Ed.2d 600 at 610), that access to the courts must be accorded to all people and rights of action may not be denied without providing a reasonable substitute (*New York Central Railroad v. White* (1916) 243 U.S. 188, 61 L.Ed. 774 at 777) and that the same rules of equality applicable to state and local governments inherent in the Fourteenth Amendment are applicable to the Federal Government through the due process clause of the Fifth Amendment. 16 *Am. Jur.* 2d 854, Const. Law, Sec. 490.

We respectfully submit that there is no rational basis for legislation which acknowledges liability for carelessness, but denies liability for wilful misconduct, should be declared invalid as a denial of due process of law.

And we respectfully submit that legislation which denies a right of action against the government for conduct which would be actionable against all other legal entities should be declared invalid as a denial of equal protection of the laws, and therefore a denial of due process of law under the Fifth Amendment.

D. THE TREND IS AWAY FROM SOVEREIGN IMMUNITY

Many, many articles have been written by eminent scholars decrying the unjust doctrine of sovereign immunity. We here list a few:

Borchard, *Government Liability and Tort*, 34 Yale L.J. (1924); Davis, *Sovereign Immunity Must Go*, 22 Ad. L. Rev. 383 (1970); Davis, *Tort Liability of Governmental Units*, 40 Minn. L. Rev. 751 (1956); Green, *Freedom of Litigation*, 38 Ill. L. Rev. 355 (1945); Harno, *Tort Liability of Municipal Corporations*, 4 Ill. L.Q. 28 (1921); Kantrowitz and Leflar, *Tort Liability of the State*, 29 N.Y.U.L. Rev. 1363 (1954); Cramer, *Government Tort Liability Doctrine in the United States*, 1796 1955, 1966 Ill. L. Forum 795 (1966); Mifka, *Sovereign Immunity*, 1966 Ill. L. Forum 828 (1966); Peck, *The Role of the Courts and Legislature in the Reform of Tort Law*, 48 Minn. L. Rev. (1966); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La. L. Rev. 476 (1953); Repko, *American Legal Commentary on the Doctrine of Municipal Tort Liability*, 9 Law and Contemporary Problems 214 (1942); Rosenfield, *Governmental Immunity from Liability for Tort in School Accidents*, 5 Legal Notes on Local Government 380 (1940); Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A. L. Rev. 463 (1963); Shumate, *Tort Claims Against State Government*, 9 Law and Contemporary Problems 242 (1942); *State Immunity from Suit Without Consent: Scope and Implications*, 1971 Wis. L. Rev. 879 (1971); Comments, *Sovereign Immunity in Ohio: Long Lives the King*, 28 O.S.L.J. 75 (1967); Editorial Note, *Claims Against the State of Ohio*

and the Need for Reform, 36 Cin. L. Rev. 239 (1967); *Governmental Immunity from Tort Liability: Has the Rationale Disappeared?,* 39 U.M.K.C. L. Rev. 252 (1971); Note, *The Sovereign Immunity of the State: The Doctrine and Some of Its Recent Developments,* 40 Minn. L. Rev. 234 (1965); *Approaches to Governmental Immunity for Tort,* 9 Law and Contemporary Problems 182 (1942); Note, *Limitations on the Doctrine of Sovereign Immunity from Suit,* 41 Col. L. Rev. 1236 (1941).

The incongruity of liability for carelessness but exemption for deliberate torts under the Federal Tort Claims Act is sharply criticized by Kenneth Culp Davis in his "Administrative Law Treatise", Sec. 25.08 (1958, Supp. 1970) pages 854-857 in such terms as:

> "The continued exemption of most deliberate torts seems clearly a source of injustice." (854)
>
> . . .
>
> "The government is not liable if a nurse's aid kills a mental patient through use of excessive force, since the government is not liable for assault and battery . . ." (854)
>
> . . .
>
> "The 'misrepresentation' exception seems to be a clear barrier to justice." (855)
>
> . . .
>
> "The manner in which the courts use the 'misrepresentation' exception seems often harmful to the needs of justice." (855)
>
> . . .

"If the case means what it seems to mean, the holding is atrocious from the standpoint of justice." (856)

. . .

"Not only the 'misrepresentation' exception but the other exceptions of named deliberate torts should be reexamined. Worth repeating is the observation in the Treatise that at the time of the enactment of the Tort Claims Act in 1946 no reasons were stated in support of the exceptions of the named deliberate torts." (857)

E. THE SPIRIT OF CHISHOLM v. GEORGIA

In 1793, the Supreme Court of the United States, composed of men who knew what it meant to fight for the Rights of Man, rendered an historical decision in the case of *Chisholm v. Georgia*, 2 U.S. 16. The narrow issue in the case was whether a citizen of one state could sue a state other than that of his citizenship in a federal court. But the opinions of the Justices reflected the meaning of our form of government more clearly than any other legal writing we know.

The Justices pointed out, as between the Government and the people, it is the people who are sovereign (2 U.S. at 43); "Let a state be considered as subordinate to the people" (2 U.S. at 44); the concept of sovereign immunity is "inverted" and a "perversion" (2 U.S. at 44); "the very term sovereign implies 'subjects', but under our constitution there are citizens, but no subjects (2 U.S. at 45); the citizens have reserved the supreme power in their own hands and

on that basis have made the government dependent instead of being sovereign (2 U.S. at 46); laws in this nation, as distinct from England, must be founded on the concept of the people and "the sovereign, when traced to his source, must be found in the man" (2 U.S. at 47); the concepts of sovereignty, particularly in England, exist on feudal principles and "no such ideas obtain here; at the revolution the sovereignty devolved on the people" (2 U.S. at 60); the right of a citizen to sue the government was discussed thoroughly by Justice Jay saying "It is plain then, that a State may be sued", and ". . . suability and state sovereignty are not incompatible" (2 U.S. at 62): and finally, the right of a citizen to sue the government "appears to me to be wise, because it is honest. . . . It is honest, because it provides for doing justice. . . ." (2 U.S. at 68).

Thus the "Spirit of *Chisholm v. Georgia* utterly rejects the idea that the government is superior to the individual, but rather reflects that equality of the individual with the government; it rejects the idea of men's rights being derived from the government but asserts that the rights of the government come only from the people; it rejects the concept that the government must give its consent to be sued; it rejects the concept of sovereign immunity in a nation of free men.

F. COURT OF APPEALS' OPINION DOES NOT MEET THE CONSTITUTIONAL ARGUMENT

The Memorandum Opinion of the Court of Appeals, while recognizing that Walden has raised the issue of whether the doctrine of sovereign immunity, and in particular the fraud exception to the Federal Tort Claims Act, 28 U.S.C. 2680(h) is unconstitutional, wholly fails to meet the argument that the concept of sovereign immunity is in conflict with the Fifth, Ninth & Tenth Amendments to the Constitution.

The Memorandum Opinion does not say sovereign immunity is constitutional.

The Memorandum Opinion of the Court of Appeals does not say the fraud exception to the Tort Claims Act is constitutional.

The Memorandum Opinion merely says:

> "In the absence of guidance by the Supreme Court supporting Walden's position, our duty is to apply the current principles of sovereign immunity."

The Memorandum Opinion then cites from cases none of which meet the constitutional point we have urged.

Referring directly to each case cited by the Court of Appeals in support of its contentions on the issue of sovereign immunity, we make these observations:

In *Keifer v. R.F.C.* (1939) 306 U.S. 381, the Supreme Court described sovereign immunity as "legal irresponsibility," and stated:

> "As to the states, legal irresponsibility was written into the Eleventh Amendment to the Constitu-

> tion: as to the United States, it is derived by implication. *Principality of Monaco v. Mississippi,* 292 U.S. 313, 321, 54 S.Ct. 745, 747, 78 L.Ed. 1282."

We suggest that these comments were dicta as the statute provided that the Reconstruction Finance Corporation could "sue or be sued," and a suit in tort was upheld. Further, the Eleventh Amendment does not bar suits against States, but merely prohibits the use of the Federal Courts for suits against a State. The Eleventh Amendment does not prohibit a suit against a State in a State Court.

The reference in *Keifer,* supra, to *principality of Monaco v. Mississippi,* supra, for the proposition that sovereign immunity, as to the United States, is derived by implication is likewise dicta unless it is confined to the facts of the latter case which was a suit by a foreign government against a State of the United States. In *"Monaco,"* supra, at 54 S.Ct. 749 the court recognized the principles of *Chisholm v. Georgia* which we refer to in this Petition, but denied the suit on the basis of the Eleventh Amendment which provides that the federal judiciary shall not be used for a suit by a citizen of a foreign state against a State of the United States. The *Monaco* case, supra, does refer to the doctrine of sovereign immunity, calling it "the established doctrine of sovereign immunity" at page 747, and at page 748 referring to the doctrine as "the postulate."

In *Hans v. Louisiana* (1890) 10 S.Ct. 504 at 507, the majority opinion stated that "the suability of the

state, without its consent, was a thing unknown to the law," although Justice Harlan in his dissent at page 509, said the case of *Chisholm v. Georgia* "was based upon a sound interpretation of the constitution as that instrument then was."

In summary, none of the cases cited by the government discussed the application of the Fifth, Ninth, or Tenth Amendments of the Constitution to either the concept of sovereign immunity or to the exemption provisions of the Federal Tort Claims Act.

In the District Court we stated:

> "To our knowledge the constitutionality of the immunity provisions of the Federal Tort Claims Act has never been challenged. If we are mistaken, and there are such cases, we would appreciate hearing of them so that we may read and comment on them." (Record on Appeal 67:28-32.)

To the Court of Appeals in "Appellant's Opening Brief" at page 26, after restating our contention, we said:

> No such authority has yet been mentioned by the United States Attorney or by the District Court. The opinion of the learned District Court Judge does inferentially acknowledge that no case has been found in which the constitutionality of the Federal Tort Claims Act has been discussed. (Record on Appeal 114:23-115:12)

And now we find that the Memorandum Opinion of the Court of Appeals cites no case in which the constitutionality of the immunity provisions of the Federal Tort Claims Act has been discussed.

We respectfully submit that the constitutional argument is not met by merely saying "our duty is to apply current principles of sovereign immunity".

What are the "current principles of sovereign immunity"?

We hope the Supreme Court of the United States of America in the year 1974 will not say current principles of sovereign immunity are consistent with the divine right of kings, or that in a democracy, the people are subjects and must have the consent of the government to hold the government responsible for fraud.

We hope that the Supreme Court of the United States of America in the year 1974 will say that the expressions of the Supreme Courts of Arizona, Arkansas, California, Colorado, Florida, Illinois, Michigan, Minnesota, Nebraska, Nevada, New Jersey, Rhode Island and Wisconsin, when they utterly rejected the concept of sovereign immunity, are the "current principles of sovereign immunity". The citations to the opinions of Supreme Courts of these thirteen states—Is there something significant in that there are thirteen "original" states?—are here listed:

Arizona:

Stone v. Arizona Highway Commission (1963) 381 P.2d 107;

Arkansas:

Parish v. Pitts (1968) 429 S.W.2d 45;

California:

Muskoff v. Corning Hospital District (1961) 359 P.2d 457;

Colorado:

Evans v. Board of Commissioners (1971) 482 P.2d 968;

Florida:

Hargrove v. Town of Cocoa Beach (1957) 96 So.2d 130;

Illinois:

Molitor v. Kaneland District (1959) 163 N.E.2d 89;

Michigan:

Williams v. City of Detroit (1961) 111 N.W.2d 1;

Minnesota:

Spanel v. Mounds View School District (1962) 118 N.W.2d 795;

Nebraska:

Brown v. City of Omaha (1968) 160 N.W.2d 805;

Nevada:

Rice v. Clark County (1963) 382 P.2d 605;

New Jersey:

Willis v. Dept. of Conservation, etc. (1970) 264 A.2d 34;

Rhode Island:

Becker v. Beaudoin (1970) 261 A.2d 896;

Wisconsin:

Holytz v. City of Milwaukee (1962) 115 N.W. 2d 618.

IV

THE DISTRICT COURT HAD JURISDICTION

The point raised by the Court of Appeals to the effect that the removal process "did not cure any jurisdictional defect in the state court" was not raised in the District Court either by the government or by the Court, and was not raised in the Court of Appeals by the government. The first mention of such a contention throughout the four years of litigation is found in the Memorandum Opinion of the Court of Appeals.

Had the point been raised in the District Court the Petitioners would have had a reasonable opportunity to have considered the point and had the opportunity to have filed a new action in the District Court and thus obviated the problem altogether.

It seems grossly unfair to one who has been defrauded by the federal government to be told by the Judiciary of the federal government that sovereign immunity precludes your filing suit for fraud because the federal government has not consented to be sued for fraud, and, further you can't even raise the question of the propriety of sovereign immunity or the unconstitutionality of the statutory exemption for fraud by your government because you started the litigation in the state court and the fact that the government removed the case to the federal District Court did not mean that the District Court could hear your plea.

We trust that the Supreme Court of the United States in the year 1974 will hear that plea.

To require that the District Court clerk's office be cluttered with another separately filed set of papers seems placing form over substance in its purest sense.

The state court had jurisdiction of the Small Business Administration by virtue of 15 U.S.C. Section 634(b) which provides:

> "In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may—(1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property."

If the fraud exemption provision of the Federal Tort Claims Act is unconstitutional, and if the doctrine of sovereign immunity should be rejected by the Supreme Court of the United States, it would appear philosophically inconsistent to hold that such basic points of law cannot even be ruled upon solely because, although the litigation was actually heard by the District Court, it was commenced in the state court.

Lewis Carroll in collaboration with George Orwell would have had a hard time imagining anything "curioser".

We respectfully submit that this point can be resolved equitably by a ruling by the Supreme Court

that, in this case, as the parties were all before the District Court and the subject matter was thoroughly and exhaustively litigated in the District Court, the District Court had jurisdiction.

V

TIME FOR RECONSIDERATION

There comes a time in the history of jurisprudence when basic reconsideration is in order, when to avoid an issue is to create a larger issue, when to decline to hear a case is to give the appearance of approval of that which one does not approve.

We believe the time has come for a basic reconsideration of the doctrine of sovereign immunity.

We do not believe this Court wants to abdicate to the legislature the power to correct Court-made errors of law.

We do not believe this Court wants to give the appearance of adhering to the principle of the Divine Right of Kings.

We do not believe this Court wants to give the appearance of approving a "Double Standard" of tort liability—with liability for the individual and immunity for the state.

We do not believe this Court wants to give the appearance of approving a *lower standard* of moral and legal responsibility for the state than for the individual.

We do not believe this Court wants to give the appearance of turning a deaf ear on the plea of one small individual who asks for equal justice—which includes equal tort liability.

But, may we respectfully say, these are the appearances which are now before us.

The Court in case after case involving the Doctrine of Sovereign Immunity, has left a distinct judicial trail leading directly to abdication to the legislature of the fundamental responsibility of the Judicial Branch of the Government to correct judicial error.

The Court, in case after case involving the Doctrine of Sovereign Immunity, has left a distinct appearance of approval of the principle of the Divine Right of Kings—a doctrine which, at best, has outlived its usefulness.

The Court, in case after case involving the Doctrine of Sovereign Immunity, has left the appearance of approving a "Double Standard" of liability, with the governing body, which ought to set the example, actually having a lower standard of moral and legal responsibility.

The Court, in case after case involving the Doctrine of Sovereign Immunity, has left the appearance of putting the government *above* the individual—a concept which we know is abhorrent to the members of this Court.

We respectfully urge that the time has come to place the individual on an equal status with the government; the time has come to assure equal justice;

the time has come to judicially recognize that without equal tort liability for the individual and the government, there is no equal justice for the maimed or the survivors of the dead.

For the government to say, whether through the Congress or the Courts, that the government can commit fraud on its citizens with impunity is shocking.

In a nation of free men it is a reflection on the government.

The time is here for reconsideration of the doctrine of sovereign immunity.

VI

CONCLUSION

Focusing our attention on the case at bar once again, may we respectfully underscore that this is a case in which Petitioners assert they have been defrauded by the government of the United States.

The government says it can be held liable for carelessness but not for a deliberate fraud. The substance of the government position is the worse the conduct the less the liability.

No rationalization can twist that proposition into good sense. If due process means basic fairness, such a proposition is a denial of due process.

No rationalization can say that liability for fraud by private entities and no liability for the same fraud by public entities is equal protection of law.

The problem lies in the doctrine of sovereign immunity.

We respectfully ask that the doctrine of sovereign immunity be rejected by the Supreme Court of the United States.

We respectfully ask that a statute which recognizes liability for mere carelessness but creates a license for heinous conduct be declared in violation of the spirit of the Constitution of the United States of America, and, in particular, in contravention of the Fifth, Ninth and Tenth Amendments to the Constitution.

There is no place in the Bill of Rights for the concept of sovereign immunity.

Dated, February 27, 1974

Respectfully submitted,
REGINALD M. WATT,
WATT, LEVERENZ & WARD,
Attorneys for Petitioners.

(Appendices Follow)

Appendix A

DO NOT PUBLISH

United States Court of Appeals
For the Ninth Circuit

Robert E. Walden and Rosemary Walden, Appellants, vs. Small Business Administration, John D. McDonald, Randy Lynn, Does 1-100, Appellees.	No. 72-2845 MEMORANDUM

[December 19, 1973]

Before: Ely, Hufstedler and Sneed, Circuit Judges.

Per Curiam:

Walden appeals the dismissal on jurisdictional grounds of his action for fraud against the Small Business Administration. On June 4, 1970, Walden commenced an action in a California state court seeking to recover the sum of $100,000 from the Small Business Administration, it being alleged that the SBA had fraudulently misrepresented the value of certain real property which he subsequently purchased. The action was removed to the United States

District Court for the Eastern District of California, where it was ultimately dismissed for lack of jurisdiction pursuant to 28 U.S.C. §2680(h). In this appeal Walden attempts to raise the issue of whether the doctrine of sovereign immunity, and in particular the exceptions to the Federal Tort Claims Act, 28 U.S.C. §§2671 *et seq.*, is unconstitutional. We affirm.

In the absence of guidance by the Supreme Court supporting Walden's position, our duty is to apply the current principles of sovereign immunity. It is well settled that the United States may not be sued absent consent. *See e.g., Laird v. Nelms,* 406 U.S. 797 (1972); *Keifer & Keifer v. R.F.C.,* 306 U.S. 381 (1939); *Principality of Monaco v. Mississippi,* 292 U.S. 313 (1934); *Hans v. Louisiana,* 134 *U.S.* 1 (1890). Tort actions against the United States must be brought under the Federal Tort Claims Act, 28 U.S.C. §1346(b) and §§2671, *et seq.* Under that Act, the consent to suit does not extend to suits brought against the United States in courts of the several states; and thus the California court was without jurisdiction over this controversy from its inception. Nor did the removal of the action to the federal district court cure the jurisdictional defect. *See Minnesota v. United States,* 305 U.S. 382, 389 (1939); *Lambert Run Coal Co. v. Baltimore & Ohio Railroad Co.,* 258 U.S. 377, 379 (1922). *See also Gleason v. United States,* 458 F.2d 171 (2d Cir. 1972). The action was properly dismissed for lack of jurisdiction.

Appendix B

In the United States District Court
for the Eastern District of California

No. Civil S-1672

Robert E. Walden and
Rosemary Walden,
Plaintiffs,

vs.

Small Business Administration,
John D. McDonald, Randy Lynn,
and Does 1-100,
Defendants.

[Filed July 21, 1972]

MEMORANDUM AND ORDER

Plaintiffs Robert and Rosemary Walden purchased a trailer court in Butte County with the proceeds of a loan of $102,000 procured from the Small Business Administration (SBA), an agency of the United States. According to the complaint the Small Business Administration through its agent John D. McDonald represented to plaintiffs that the property was worth $100,000 when SBA appraisers had valued the property at only $49,000. Plaintiffs allegedly did not know of the $49,000 appraisal until February,

1970, after they had defaulted on their payments under the loan agreement.

Plaintiffs bring five causes of action in this suit. (There is no count five but the final count is numbered "six.") Count two is an action for reformation of the loan agreement and has been withdrawn by plaintiffs. Count four is an action to enjoin the sale of the collateral. It was previously denied by the Court, and the property has been sold. Accordingly, the Court will consider only counts one, three, and six.

Defendants Small Business Administration and John D. McDonald have moved for judgment on the pleadings pursuant to Rule 12(c), Federal Rules of Civil Procedure, for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, and for dismissal of plaintiffs' complaint and amendments to the complaint.

First Cause of Action: Fraud

The Small Business Administration is an integral part of the United States government and has full sovereign immunity unless it has been waived. *United States v. Mel's Lockers*, 346 F.2d 168 (10th Cir. 1965); *Small Business Administration v. McClellan*, 364 U.S. 446 (1960). Plaintiffs' first cause of action is captioned "fraud" and contains the classic elements of that tort, i.e., misrepresentation, intent to deceive, reliance, and damages. The United States has consented to be sued for torts of its employees while acting within the scope of their office or employment by

the Federal Tort Claims Act, 28 U.S.C. Section 1346 (b),[1] 2671 et seq. However, there are many exceptions to this general waiver of immunity by Congress, and 28 U.S.C. Section 2680(h)[2] specifically excepts misrepresentation and deceit from tort claims cognizable against the United States. This section has been interpreted by the United States Supreme Court to bar negligent and intentional misrepresentation. *United States v. Neustadt*, 366 U.S. 696 (1961). See also *Clark v. United States*, 218 F.2d 446 (9th Cir. 1954).

Although Congress has given the Small Business Administration the right "to sue and be sued" in 15 U.S.C. Section 634(b),[3] this statute does not override

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[1]28 U.S.C. Section 1346(b) provides: Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

[2]28 U.S.C. Section 2680(h): The provisions of this chapter and section 1346(b) of this title shall not apply to — . . . (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

[3]15 U.S.C. Section 634(b): In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may—(1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property.

the immunity granted by 28 U.S.C. Section 2680(h). 28 U.S.C. Section 2679(a) states:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

In a similar action against the Federal Housing Administration, this exclusivity provision of the Federal Tort Claims Act was held to prevail although the FHA is also authorized to sue and be sued by 12 U.S.C. Section 1702. *Edelman v. Federal Housing Administration,* 382 F.2d 594 (2d Cir. 1967). And in *Mullins v. First National Exchange Bank of Virginia,* 275 F.Supp. 712 (W.D. Va. 1967), a district court ruled that the subsequent chartering of the Small Business Administration with "sue and be sued" status after passage of the Tort Claims Act did not exempt suits against the SBA from the strictures of tort claims remedies.

Plaintiffs argue alternatively that if 28 U.S.C. Section 2680(h) does apply in this action that the section is unconstitutional, being a denial of due process under the Fifth Amendment and in violation of the Ninth, Tenth, and Eleventh Amendments. In view of the long history of the doctrine of sovereign immunity in the United States, and the complex statutory scheme allowing suit against the government only in certain instances, this Court declines to so hold. Although the doctrine of sovereign immunity has

sometimes been criticized, no authority has been found supporting the view that it is unconstitutional. And although the great number of cases upholding the doctrine do not generally speak in constitutional terms, at least one case has held that "immunity of the sovereign from suit is paramount even over rights founded on the Constitution." *Pflueger v. United States*, 121 F.2d 732, 735 (D.C. Cir. 1941, cert. denied 314 U.S. 617). Consent to sue the United States is a privilege accorded by Congress, and not a property right protected by the Fifth Amendment. It may be withdrawn even though given after much deliberation and for pecuniary consideration. *Id.*

Thus the Court finds that the alleged misrepresentations are not actionable against the United States when viewed as tortious conduct and that the first cause of action against the Small Business Administration, or the real party in interest, the United States, should be dismissed.

The Court also lacks jurisdiction over the other defendants in the first cause of action. The provision relied on for jurisdiction (28 U.S.C. Section 1346) establishes jurisdiction only over certain suits against the United States; it does not permit the joinder of other parties. *Williams v. United States*, 405 F.2d 951 (9th Cir. 1969). The Ninth Circuit has repeatedly held that "In order for a claim against other parties to be joined properly with a claim against the United States under the Federal Tort Claims Act, an independent ground of jurisdiction must exist, and the theory of pendent jurisdiction is not sufficient." *Id.*

at 954; *Sykes v. United States*, 290 F.2d 555, 556 (9th Cir. 1961); *Benbow v. Wolf*, 217 F.2d 203, 205 (9th Cir. 1954). In the instant case there appears to be no diversity of citizenship between plaintiffs and the remaining defendants or any other basis for federal jurisdiction.

Accordingly, the cause of action in tort is dismissed against all defendants pursuant to Rules 12(b)(1) and 12(b)(2), Federal Rules of Civil Procedure.

Third Cause of Action: Rescission

Plaintiffs in their third cause of action ask for rescission of the loan agreement because of the alleged fraud. This cause of action, as defendants point out in their answer to the complaint, is moot. There has already been a *de facto* rescission of the loan agreement. Defendants no longer hold the deeds of trust to the properties, and plaintiffs are no longer obligated to repay the loan. Neither the plaintiffs nor the defendants now have any interest in the properties in question; they have been sold to third persons. The only remedy available to plaintiffs at this time, if they have been wrongfully deprived of their property, is damages, which they are already seeking in their first and sixth causes of action.

Sixth Cause of Action: Breach of Contract
Jurisdiction

Plaintiffs allege in their amended complaint asserting this cause of action that defendants expressly and impliedly warranted that the property had been appraised by them and was worth $100,000 when in

fact it had been appraised at and was worth only $49,000. Before considering the merits of this claim, the Court must determine whether there is subject matter jurisdiction in this Court.

The Tucker Act, which gives consent for the United States to be sued in contract, gives district courts concurrent jurisdiction with the Court of Claims on claims not exceeding $10,000 in amount. 28 U.S.C. Section 1346(a)(2). Only the Court of Claims has jurisdiction over claims against the United States arising out of contract where the amount of the claim is more than $10,000. 28 U.S.C. Section 1491. Plaintiffs' prayer in this cause of action is for damages of $200,000. Therefore defendants argue that this Court lacks subject matter jurisdiction and the cause of action should be transferred to the Court of Claims.

Plaintiffs, however, in their "Second Amendment to Complaint" assert jurisdiction under 15 U.S.C. Section 634(b)(1), which provides that actions may be brought against the Administrator in any United States district court without regard to the amount in controversy. Defendants contend that the Tucker Act takes precedence over this provision. This contention is based on an unpublished opinion from the District Court of Colorado, *United States v. Kelley*, Civil No. C-1869, (D.C. Colo. 1970), which held that a district court lacks jurisdiction over a contract claim against the Small Business Administration for more than $10,000 notwithstanding the language of the Small Business Act. But this Court does not find the *Kelley* opinion persuasive.

This difference of opinion is prompted by the Colorado court's interpretation of *United States v. Mel's Lockers,* 346 F.2d 168 (10th Cir. 1965), on which that court appears to rely for its decision. The *Kelley* opinion at p. 4 says that: "The Tenth Circuit . . . has recently held that the Small Business Act did not waive the sovereign immunity of the Small Business Administration." *Mel's Lockers* appears to hold instead that the Small Business Act does not waive immunity of the Small Business Administration *from injunctions,* not that there is no waiver of sovereign immunity at all. *United States v. Mel's Lockers, supra,* at 169-170.

This Court also disagrees with the *Kelley* explanation of the phrase "without regard to the amount in controversy" in Section 634(b)(1). In the absence of any legislative history, the *Kelley* court theorized that Congress meant to provide another exception to the minimum amount in controversy requirement of 28 U.S.C. Section 1331 rather than to the maximum amount requirement of the Tucker Act. It seems less strained to infer that Congress intended what it said. "In [the] absence of special circumstances, we assume that when Congress authorized federal instrumentalities of the type here involved to 'sue and be sued' it used those words in their usual and ordinary sense." *Federal Housing Administration v. Burr,* 309 U.S. 488, 491 (1940).

There is some precedent for allowing suits in contract involving more than $10,000 to be brought in federal district courts against "sue and be sued"

agencies of the United States government. See *Union National Bank of Clarksburg, W.Va., v. McDonald*, 36 F.Supp. 46 (N.D. W.Va. 1940). In this case the district court held that although the suit against the Federal Housing Administrator was in fact against the United States, no transfer to the Court of Claims was necessary in view of a statute providing that the administrator could "sue and be sued" in any court of competent jurisdiction, state or federal.

A fortiori, the Small Business Act should take precedence over the Tucker Act because Congress states more explicitly in the Small Business Act that "the Administrator may sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy." 15 U.S.C. Section 634(b)(1). To hold otherwise would flaunt the Supreme Court's ruling that waivers of governmental immunity of federal agencies by Congress should be liberally construed. *Federal Housing Administration v. Burr, supra.*

As the court in *Union National Bank of Clarksburg v. McDonald, supra*, at 49 reasoned:

> There can be no question that this suit could have been brought in a state court. It is unreasonable to believe that Congress intended to give state courts unlimited jurisdiction as to amount in cases such as this, arising under the laws of the United States, and limit its own District Courts to cases of $10,000 and less.

> In the Keifer case the Supreme Court refused to read the "not sounding in tort" language of the Court of Claims Act into the "to sue and be sued provision. For the same reason the "not exceeding $10,000" language in the Court of Claims Act can not be read into it."

Substantiality of the Claim

Plaintiffs present two theories on which they base their cause of action in contract. The only contract between plaintiffs and defendant Small Business Administration is the loan agreement pursuant to Section 7(b) of the Small Business Act, whereby the SBA loaned plaintiffs $102,000 for the purpose of buying a trailer park and trailer. The property being purchased and two other properties owned by plaintiffs were used as collateral to secure the loan.

Plaintiffs' first theory is that there was breach of an implied covenant of fair dealing. They state that there is an implied covenant of fair dealing in all contracts, citing *Milton v. Hudson Sales Corp.*, 152 C.A.2d 418 (1957). This is a correct statement of the law, but the theory of implied covenant of fair dealing is not so broad as to create a cause of action here for breach of contract.

The covenant of good faith, fair dealing, and cooperation is generally implied whenever cooperation of the promisee is necessary so that the promisor may carry out performance of the contract. However, the implication of good faith and fair dealing is not used to supply essential terms of a contract on which the minds of the parties have not met. See 17 AM

JUR 2d, Section 256, at 653-654. There is no allegation of bad faith by the Small Business Administration in performance of the contract. The bad faith alleged is prior to formation of the contract, or in the inducement thereof.

Plaintiffs' other theory is that of warranty. Plaintiffs allege in this cause of action that "prior to the completion of the loan Defendants expressly and impliedly, orally and in writing, warranted to Plaintiffs that the property described in Exhibit "A" had been appraised by Defendants and was reasonably worth $100,000.00 at a time when Defendants had in their possession their own appraisal of $49,000.00 of the property involved."

The Court does not agree that the alleged representation constitutes a warranty. "In essence a warranty is an assurance by one party to an agreement of the existence of a fact upon which the other party may rely; it is intended precisely to relieve the promisee of any duty to ascertain the facts for himself. Thus, a warranty amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue." *Paccon, Inc. v. United States*, 399 F.2d 162, 166-167 (Ct.Cl. 1968).

The Supreme Court stated clearly in *United States v. Neustadt*, *supra*, at 709, that Federal Housing Administration (FHA) appraisals are not warranties of value:

> That Congress did not thereby intend to convert the FHA appraisal into a warranty of value, or otherwise to extend to the purchaser any

> ment in the event of a faulty appraisal, was made irrefutably clear in the Committee Hearings in both Houses of Congress.

See also *United States v. Chelsea Towers,* 295 F. Supp. 1242 (D. N.J. 1967).

Under the analogous Small Business Act, it seems unlikely that Congress intended that the SBA should warrant its appraisals. It appears from a study of the Small Business Act and the regulations promulgated thereunder that the purpose of appraising the property to be used as collateral is to protect the government, and that no right of action exists in the mortgagor because of error or fraud.

13 Code of Federal Regulations Section 122.16, which provides for appraisals, states:

> (d) As required by the Small Business Act, as amended, the proposed loan, whether direct, immediate participation, or guaranteed, must be "of such sound value or so secured as reasonably to assure repayment."
>
> (1) Loan appraisals. Regional Directors are responsible for the proper evaluation of collateral offered to secure proposed financial assistance and of collateral pledged in connection with the administration and liquidation of financial assistance. Such evaluation will be based upon appraisals made by SBA staff appraisers/engineers, or other appraisal satisfactory to the Regional Director.

Accordingly, although this Court has jurisdiction to consider a contract claim against the Small Business

Administration, plaintiffs have failed to state such a claim and the cause of action will be dismissed pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted. The conduct which plaintiffs allege gives rise only to an action in tort and Congress has not consented to suits for misrepresentation under the Tort Claims Act.

The sixth count will also be dismissed against the remaining defendants. There is no basis for subject matter jurisdiction over claims against the other defendants. Moreover, a government agent who signs a contract only as an authorized representative of the government is not personally liable for breach of contract, *Ove Gustavsson v. Flocte*, 278 F.2d 912, 914 (2d Cir. 1960); *Rose v. McNamara*, 225 F.Supp. 891, 893 (E.D. Pa. 1963), and plaintiffs have not alleged that defendant McDonald acted beyond his statutory authority.

It Is Therefore Ordered that the motion of defendants Small Business Administration and McDonald for summary judgment pursuant to Rule 56, FRCP, as to the Third Count be, and the same is, hereby granted.

It Is Further Ordered that the complaint and the amendments to the complaint be, and the same are, hereby dismissed.

Dated: July 21, 1972.

/s/ Philip C. Wilkins
United States District Judge